

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

THANH CONG PHAN,

Defendant.

NO. CR18-0086RSM

ORDER DENYING DEFENDANT'S
MOTION FOR RECONSIDERATION,
GRANTING GOVERNMENT'S MOTION
FOR ADDITIONAL TIME, AND
AMENDING ORDER ON COMPETENCY
AND DIRECTING RISK ASSESSMENT

This matter comes before the Court on Defendant Thanh Cong Phan's Motion for Reconsideration of Order Directing Risk Assessment, Dkt. #87, and the Government's Motion for Additional Time for the Bureau of Prisons ("BOP") to complete the risk assessment pursuant to 18 U.S.C. § 4246, Dkt. #88. For the reasons set forth below, the Court DENIES Defendant's Motion for Reconsideration and GRANTS the Government's Motion for Additional Time to complete the Section 4246 risk assessment.

I. BACKGROUND

On June 11, 2020, the Court held a final competency hearing and determined that Mr. Phan is not competent to proceed to trial nor can competency be restored in the foreseeable future. Accordingly, on June 15, 2020, the Court ordered the BOP to conduct a risk assessment pursuant

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1 to 18 U.S.C. § 4246. Dkt. #84. Pursuant to Section 4247(b), the Court ordered that the risk
 2 assessment be completed and a report filed with the Court no later than forty-five (45) days from
 3 entry of this Order unless the director of the facility conducting the examination presents good
 4 cause for a thirty (30) day extension.
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6 On June 29, 2020, Defendant moved the Court to reconsider the deadlines it imposed in its
 7 June 15, 2020 order directing the risk assessment under Section 4246. Dkt. #87. On July 2, 2020,
 8 the Government moved the Court for additional time for the BOP at Federal Medical Center,
 9 Butner (“FMC Butner”) to complete the Section 4246 evaluation of Mr. Phan. Dkt. #88.
 10

11 II. DISCUSSION

12 A. Legal Standards

13 “Motions for reconsideration are disfavored.” Local CrR 12(b)(13). “The court will
 14 ordinarily deny such motions in the absence of manifest error in the prior ruling or a showing of
 15 new facts or legal authority which could not have been brought to its attention earlier with
 16 reasonable diligence.” *Id.*
 17

18 Section 4246(a) provides as follows:
 19

20 If the director of a facility in which a person is hospitalized certifies that a person
 21 in the custody of the Bureau of Prisons whose sentence is about to expire, or who
 22 has been committed to the custody of the Attorney General pursuant to section
 23 4241(d), or against whom all criminal charges have been dismissed solely for
 24 reasons related to the mental condition of the person, is presently suffering from a
 25 mental disease or defect as a result of which his release would create a substantial
 26 risk of bodily injury to another person or serious damage to property of another,
 27 and that suitable arrangements for State custody and care of the person are not
 28 available, he shall transmit the certificate to the clerk of the court for the district in
 which the person is confined.

1 18 U.S.C. § 4246(a). Section 4246(a) also provides that “[t]he court shall order a hearing to
2 determine whether the person is presently suffering from a mental disease or defect as a result of
3 which his release would create a substantial risk of bodily injury to another person or serious
4 damage to property of another.” *Id.*

5
6 Under Section 4246(b), prior to the date of a dangerousness hearing under Section 4246(a),
7 a district court “may order that a psychiatric or psychological examination of the defendant be
8 conducted.” 18 U.S.C. § 4246(b). Section 4247(b) states that, for purposes of an examination
9 ordered under Section 4246, the court may commit the person to be examined for a reasonable
10 period not exceeding 45 days and for an additional 30 days upon a showing of good cause. 18
11 U.S.C. § 4247(b).

12 **B. Authority to Order Evaluation**

13
14 Defendant argues that the Court lacked authority to direct an evaluation pursuant to Section
15 4246(b) because, by his reading of Section 4246(a), an evaluation is only allowed after the FMC
16 director has filed a certification with the clerk of the court in the district where the individual is
17 confined. Dkt. #87 at 3 (citing 18 U.S.C. § 4246; *Weber v. U.S. Dist. Court for Cent. Dist. Of*
18 *California*, 9 F.3d 76, 78–79 (9th Cir. 1993)). For that reason, Defendant argues, the Court “is not
19 ordering the full examination contemplated by § 4246(b)” because that examination must be
20 ordered by the U.S. District Court for the Eastern District of North Carolina, where Mr. Phan is
21 confined. *Id.* As such, the Court’s Order to conduct a “preliminary ‘risk assessment’” is not the
22 same as an evaluation under Section 4246(b) and is therefore not subject to the time limitations
23 under Section 4247(b). *Id.* at 4.

1 Defendant's reading of Section 4246(b) was considered and rejected by the Ninth Circuit
2 in *United States v. Godinez-Ortiz*, 563 F.3d 1022 (9th Cir. 2009). In that case, the court held that
3 Section 4246 "necessarily contemplates the temporary commitment of that person so that the
4 director can conduct the evaluation necessary to make the certification decision." *Id.* at 1032. Such
5 is the case here. Having determined at the final competency hearing on June 11, 2020 that Mr.
6 Phan is not competent to proceed to trial nor can competency be restored in the foreseeable future,
7 the Court ordered him committed to FMC Butner "to provide the director with an opportunity to
8 consider whether to issue a dangerousness certificate pursuant to § 4246." *Id.* *Godinez-Ortiz*
9 further established that "the duration of such commitments is controlled by 18 U.S.C. § 4247(b)."
10 For this reason, the Court finds no error in its initial order applying the 45-day time period set forth
11 under Section 4247(b).
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13
14 The *Godinez-Ortiz* court likewise distinguished *Weber*, which Defendant relies upon here.
15 See Dkt. #87 at 3. In *Weber*, the Ninth Circuit held that the district court was not authorized to
16 order that defendant, who was hospitalized pursuant to Section 4244, be returned to the hospital
17 for an evaluation under Section 4246 after the director certified he had recovered from his mental
18 disease to such an extent that he was no longer in need of custody for treatment under Section
19 4244(d). See *Weber*, 9 F.3d at 78–79. Here, as in *Godinez-Ortiz*, the director has not issued any
20 certification that he has recovered, and the Court has declared Mr. Phan incompetent to stand trial.
21 See *Godinez-Ortiz*, 563 F.3d at 1031. For these reasons, the Court finds *Weber* inapposite.
22

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24 Accordingly, Defendant has failed to show that the Court erred in ordering that the
25 evaluation be completed and a report filed pursuant to the 45-day deadline set forth under Section
26 4247(b).
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C. Good Cause for Extension of Time

The Court will now address the Government’s motion requesting an additional 30 days for BOP to complete the evaluation. The Government has requested additional time due to modified operations at FMC Butner as a result of the COVID-19 pandemic, which limits access to inmates for in-person interviews and requires additional medical screenings before in-person meetings may occur. Dkt. #88 at 2. Defendant argues that Mr. Phan has been in the custody of FMC Butner “for almost two years,” thereby undermining any argument from BOP that they require additional time to assess his risk pursuant to Section 4246(a). Dkt. #89 at 2. The Court disagrees. While Mr. Phan has been in custody of FMC Butner for purposes of competency restoration, the facility’s review was limited to assessing his competency to stand trial—not future dangerousness for the purposes of civil commitment. The Court is persuaded by the Government’s argument that these inquiries are distinct and that the dangerousness evaluation “is more involved than some other forms of evaluations.” Dkt. #88 at 3. Indeed, the statutory scheme under Section 4247(b) contemplates a longer evaluation period than that required for competency. *See* 18 U.S.C. § 4247(b).

Accordingly, in light of the modified operations at FMC Butner created by the COVID-19 health crisis, the Court finds that BOP has established good cause to extend the evaluation period and will grant an additional 30 days from the date of the June 15, 2020 order to complete the evaluation.

D. Amended Order Directing Section 4246 Risk Assessment

Finally, the Government requests that the Court amend its previous order directing a risk assessment under Section 4246 to include its finding at the June 11, 2020 competency hearing that

1 Mr. Phan is not competent to proceed to trial and that competency is not restorable in the
2 foreseeable future. Dkt. #88 at 4. The Court includes this finding as set forth below.

3 4 **III. CONCLUSION**

5 This Court, having previously held a competency hearing on June 11, 2020, finding that
6 Mr. Phan is not competent to proceed to trial nor can competency be restorable in the foreseeable
7 future, DENIES Defendant's Motion for Reconsideration, Dkt. #87, and GRANTS the
8 Government's Motion for Additional Time, Dkt. #88.

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10 IT IS HEREBY ORDERED that Defendant Thanh Cong Phan be committed to the custody
11 of the Attorney General or a designated representative, pursuant to Title 18, United States Code,
12 Section 4246, for the purpose of conducting a formal risk assessment to determine whether he is
13 presently suffering from a mental disease or defect as a result of which his release would create a
14 substantial risk of bodily injury to another person or serious damage to the property of another.

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16 IT IS FURTHER ORDERED that pursuant to Title 18, United States Code, Section
17 4247(b), the examination shall be completed and a report filed with the Court no later than a total
18 of seventy-five (75) days from entry of the initial Order dated June 15, 2020, Dkt. #84.

19
20 IT IS FURTHER ORDERED that the time between the date of entry of this Order and the
21 date on which the Attorney General or a designated representative completes the risk assessment
22 is excludable under the Speedy Trial Act, Title 18, United States Code, Section 3161(h)(7). The
23 Court finds that the ends of justice served by conducting the risk assessment outweigh the best
24 interest of the public and the Defendant in a speedy trial.

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26 IT IS FURTHER ORDERD that the United States District Court Clerk is directed
27 to provide the United States Marshal's Service with a certified copy of this Order.

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2 DATED this 13th day of July, 2020.
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7 RICARDO S. MARTINEZ
8 CHIEF UNITED STATES DISTRICT JUDGE
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